No. 10-336

In the Supreme Court of the United States

LARRY GREEN,

Petitioner,

v.

FIDELITY INVESTMENTS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit correctly held that Petitioner failed to state a *prima facie* case of age discrimination.

2. Whether there is a circuit conflict over the fourth prong of the *McDonnell Douglas* test when the circuit courts' approach to this test is substantially the same.

3. Whether the Court should determine if *McDonnell Douglas* applies to the ADEA when Petitioner waived his right to raise this question.

RULE 29.6 STATEMENT

The parties to this proceeding are Petitioner Larry Green and Respondent Fidelity Investments. No parent or publicly held company owns more than 10% of Respondent's stock.

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Despite having presented no evidence to prove a *prima facie* case of age discrimination, Petitioner now asks this Court to grant review to decide whether the Sixth Circuit correctly applied the *McDonnell Douglas* test. For multiple reasons, the petition should be denied. First, Petitioner's failure to present any evidence of age bias supports the Sixth Circuit's decision that Petitioner failed to state even a *prima facie* case of age discrimination. Second, the Sixth Circuit's approach to the *prima facie* case component of the *McDonnell Douglas* test is not different than the approach taken by other circuits, so there is no circuit conflict on this issue. Third, by conceding the issue below, Petitioner waived his right to question whether *McDonnell Douglas* should apply to the ADEA.

STATEMENT OF THE CASE

A. Factual Background

As an investment representative for Fidelity Brokerage Services, LLC ("Fidelity"),[1] Petitioner answered inbound telephone calls from current and potential Fidelity customers. Pet. App. 2a. Petitioner was required to "qualify" each customer by asking a series of pre-determined questions. *Id.* at 2a-3a. Based on a customer's responses, Petitioner would mark a "lead" in the customer's account. *Id.*

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[1] "Fidelity Investments," named as the defendant in this action, is a servicemark and not a legal entity. Petitioner's legal employer was Fidelity Brokerage Services, LLC, on whose behalf this opposition is presented.

Fidelity evaluated Petitioner's performance, in part, according to the quantity and quality of leads he generated. *Id.* Petitioner could earn bonuses, trips and other awards based on his lead volume. *Id.* Although Petitioner earned several such awards for his high lead volume, Petitioner had a history of claiming leads he did not properly qualify, in violation of Fidelity policy. *Id.* at 4a. In January of 2001, Petitioner's supervisor issued him a "Final Written Warning" for inappropriately taking credit for leads. *Id.* The Final Written Warning stated: "Improper coding, and ultimately receiving and taking credit for leads not transferred to the Investments department ... is unacceptable ... This warning will remain in effect for the duration of your employment with Fidelity Investments."[2] *Id.*

In March of 2006, several Fidelity managers attended a training session to listen to recordings of employee-customer telephone conversations. *Id.* at 4a. The managers listened to a recording of one of Petitioner's calls. *Id.* at 5a. Although Petitioner had entered a "lead" for this particular call, the managers

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[2] Petitioner was disciplined several other times during the course of his employment at Fidelity. In July of 2000, Petitioner was placed on corrective action for repeatedly violating Fidelity's break policy. Pet. App. 3a-4a. In June of 2003, Petitioner's supervisor issued Petitioner a Final Written Warning for providing confidential account information to a caller without verifying the caller's identity. *Id.* at 4a. In August of 2004, Petitioner was issued a ninety-day warning by Dina Rulli for excessive trading errors. *Id.* In March of 2005, Petitioner was placed on probation by Rulli for excessive trading errors. *Id.* Thus it is not true, as Petitioner contends, that Rulli had not previously disciplined him: Petitioner was disciplined by Rulli twice before his termination of employment. Pet. App. 5.

noted that Petitioner had not properly qualified the customer. *Id.*

Following the training session, Dina Rulli, Petitioner's direct supervisor, met with Petitioner and played the call for him. *Id.* Petitioner admitted that he had not qualified the customer and that he should not have entered the lead or taken credit for the lead.[3] *Id.* Rulli stated that she intended to review more of Petitioner's calls and asked him whether she would discover additional inappropriately entered leads. *Id.* Petitioner stated that she would not. *Id.*

Rulli proceeded to review a sampling of Petitioner's telephone calls from March 2006. *Id.* at 6a. She discovered that Petitioner had falsified leads for at least six additional calls during that month. *Id.* Rulli brought these findings to the attention of her supervisor and a human resources representative. *Id.* They determined that Petitioner's employment should be terminated for violation of Fidelity policy. *Id.* at 7a.

B. The Trial Court's Decision

On February 12, 2007, Petitioner filed a complaint in the United States District Court for the Southern District of Ohio alleging age discrimination under the ADEA and Ohio state law. Petitioner also alleged state law claims for breach of implied contract, defamation, and interference with prospective

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[3] At his deposition, Petitioner again admitted that he improperly took credit for the lead. Pet. App. 5a. Therefore, Petitioner's contention that he "denied any inappropriate conduct" is inaccurate. *Id.* at 2.

employment. After full discovery, in which Petitioner was allowed to examine documents and take depositions, the district court granted Respondent's motion for summary judgment on all counts with a full-length opinion.

In his summary judgment papers, Petitioner admitted that he could not identify a younger employee who had been treated differently. Pet. App. 25a. Petitioner instead asked the court to take a "flexible approach" to the *prima facie* component of the *McDonnell Douglas* test and examine whether Petitioner "ha[d] satisfied the fourth element by showing that Rulli disfavored older workers." *Id.* at 26a.

Acknowledging that an alternative, flexible approach to this part of the *McDonnell Douglas* test had been recognized by the Sixth Circuit, the district court carefully analyzed Petitioner's evidence to determine whether it "raise[d] an inference that the adverse action was motivated by discriminatory animus." *Id.* at 26a-27a, quoting *Birch v. Cuyahoga Cnty. Probate Court*, 392 F.3d 151, 166 (6th Cir. 2004). The court found that Petitioner's arguments were not supported by his own sworn testimony or any other evidence and, therefore, failed to raise such an inference:

> Green has not presented any statements by Rulli which refer to the age of any employee or otherwise indicate a discriminatory animus based on age. Moreover, the evidence presented by Green does not "tend to eliminate the most common non-discriminatory reasons" for his termination or the firing of [Green's co-worker]

> Collins. Both Green and Collins admitted that they had done what they had been accused of, and also recognized that they had previously been given warnings about their work. The Court notes that at the social function identified by Green, Rulli did not chose to sit with the younger employees, but instead sat in the middle of the table and was then surrounded by the employees. In addition, Green's own testimony contradicts the statements made by Collins and [Green's co-worker] Harland that Rulli positioned her desk near those of the younger employees. Green testified that he did not know whether Rulli assigned him a desk or picked his own, but when Collins left, Green "just moved over to her desk." Therefore, this evidence does not "raise an inference that the adverse action was motivated by discriminatory animus." Accordingly, the Court finds that Green has not presented sufficient evidence to support a *prima facie* case of age discrimination.

Id. at 28a-29a (internal citations omitted).

C. The Appellate Court's Decision

Petitioner appealed the district court's decision to the United States Court of Appeals for the Sixth Circuit. Oral arguments were held on January 13, 2010. In an unpublished opinion filed March 15, 2010, a three judge panel unanimously affirmed the decision of the district court. On May 25, 2010, the panel denied Petitioner's petition for rehearing, without dissent.

REASONS FOR DENYING THE PETITION

A. Petitioner Failed to Establish a *Prima Facie* Case of Age Discrimination

The Sixth Circuit correctly found that Petitioner could not state a *prima facie* case of age discrimination under either the traditional formulation of *McDonnell Douglas* or under the more flexible standard set forth in *Birch v. Cuyahoga County Probate Court*, *supra*. The court expressly held that Petitioner could not establish a *prima facie* case "under any standard." Pet. App. 12a.[4]

The Court's holding in *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343 (2009) confirms the Sixth Circuit's decision in this case. In *Gross*, the Court held that a plaintiff bringing a disparate treatment claim under the ADEA "must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the "but-for" cause of the challenged employer decision." *Id.* at 2351 (citation omitted). Here, because Petitioner's circumstantial evidence of age discrimination did not, "under any standard," suggest but-for causation, it was proper for the appellate court to affirm the dismissal of Petitioner's age discrimination claim.

There is no material issue of fact in this case that would preclude summary judgment for Respondent. *See Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2552 (1986) ("In our view, the plain language of Rule 56(c)

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[4] The Sixth Circuit therefore did not need to reach the issue of pretext. Pet. App. 12a, n.4.

mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case..."). Petitioner, by his own admission, was not replaced by someone younger and was not treated differently than someone younger. Further, Petitioner presented no evidence of age bias. The Sixth Circuit characterized Petitioner's circumstantial evidence as "consisting primarily of perceived social slights and his own subjective view that his performance made the decision otherwise irrational." Pet. App. 12a. Lastly, Petitioner admitted, under oath, to the commission of serious misconduct involving personal dishonesty for which his employment was terminated after several warnings.

The Sixth Circuit therefore correctly concluded that Petitioner could not, "under any standard," state a *prima facie* case of age discrimination.

B. There is No Conflict Among the Circuits Regarding the Proof Necessary to Meet the Fourth Prong of the *McDonnell Douglas* Test

There is no circuit conflict over the fourth prong of the *McDonnell Douglas* test. Like the First, Second and Seventh Circuits, the Sixth Circuit recognizes a flexible standard of proof which allows a plaintiff to state a *prima facie* case by offering evidence adequate to create an inference of discrimination:

> It does not follow, however, that the plaintiff necessarily must submit such comparative evidence in order to establish a *prima facie* case.

> The Supreme Court has explained that "[t]he facts necessarily will vary in [discrimination] cases, and the specification ... of the *prima facie* proof required ... is not necessarily applicable in every respect to different factual situations." Thus, for example, there may be cases where there is so much evidence of a decision-maker's discriminatory animus that a plaintiff's failure to satisfy the fourth element of the *McDonnell Douglas prima facie* case is not fatal to her claim.

Birch, 392 F.3d at 166 (internal citations omitted).

Accordingly, the Sixth Circuit's approach to the fourth prong of *McDonnell Douglas* is consistent with the Court's directive in *International Brotherhood of Teamsters v. United States*, 97 S.Ct. 1843, 1866 (1977) ("The importance of *McDonnell Douglas* lies ... in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.").

The cases cited by Petitioner to demonstrate the supposed circuit split state virtually the same standard as the Sixth Circuit in *Birch*. *See Rivera Aponte v. Rest. Metropol No. 3, Inc.*, 338 F.3d 9, 11 (1st Cir. 2003) ("The fourth element requires the plaintiff to produce 'evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion.'") (citation omitted); *Terry v. Ashcroft*, 336 F.3d 128, 138 (2nd Cir. 2003) ("a claimant must demonstrate that ... the adverse action occurred under 'circumstances giving rise to an inference of

discrimination.'") (citation omitted); *Robin v. Espo Eng'g Corp.*, 200 F.3d 1081, 1090 (7th Cir. 2000) (plaintiff must show that employer "hired someone else who was substantially younger or other such evidence that indicates that it is more likely than not that his age or disability was the reason for the discharge.") (citation omitted). The courts may use slightly different words, but the standard is the same; there must be some evidence that age was the reason for the employer's decision.

The opinions of the courts below further show that there is no circuit conflict on this subject. Both the district court and the appellate court considered whether Petitioner could state a *prima facie* case under the flexible standard of *Birch*. They found that Petitioner could not. The district court, after carefully evaluating all of Petitioner's evidence, determined that the evidence did not "raise an inference that the adverse action was motivated by discriminatory animus." Pet. App. 29a. Likewise, the appellate court concluded that "under any standard" (*i.e.*, under either the traditional standard or the "more flexible" standard), Petitioner could not state a *prima facie* case of age discrimination.[5]

Accordingly, there is no circuit conflict and, therefore, no reason for the writ to be granted.

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[5] The Sixth Circuit's conclusion that Petitioner's evidence does "not suggest that his age was the 'but-for' cause of his termination" is substantially the same as concluding that it does not "raise an inference that the adverse action was motivated by discriminatory animus."

C. Petitioner Waived His Right to Question Whether *McDonnell Douglas* may be Applied to ADEA Claims

Petitioner waived his right to question whether *McDonnell Douglas* applies to the ADEA because he did not raise this question in the proceedings below. This Court is the first forum in which Petitioner has raised the question. The issue was not addressed below by the district court or the Sixth Circuit because Petitioner and Respondent treated the issue as if it were settled law in their respective briefs and at oral argument.

The Court has analyzed ADEA claims under *McDonnell Douglas* when litigants did not dispute its application to their cases. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S.Ct. 2097, 2105 (2000) ("Because the parties do not dispute the issue, we shall assume, *arguendo*, that the *McDonnell Douglas* framework is fully applicable here."); *O'Connor v. Consol. Coin Caterers Corp.*, 116 S.Ct. 1307, 1310 (1996) ("We have never had occasion to decide whether that application of the Title VII rule to the ADEA context is correct, but since the parties do not contest that point, we shall assume it.").

The Court's recent decision in *Gross v. FBL Financial Services, Inc.*, *supra*, has not caused confusion among the lower courts. Since *Gross*, the circuit courts have continued to apply *McDonnell Douglas* to age discrimination claims. *See, Geiger v. Tower Auto.*, 579 F.3d 614, 622 (6th Cir. 2009); *Jones v. Okla. City Pub. Sch.*, No. 09-6108, 2010 WL 3310226, *4-5 (10th Cir. 2010) (not yet final); *Jackson v. Cal-Western Packaging Corp.*, 602 F.3d 374, 378 (5th Cir.

2010); *Gorzynski v. Jetblue Airways Corp.*, 596 F.3d 93, 106 (2d Cir. 2010); *Smith v. City of Allentown*, 589 F.3d 684, 690-91 (3d Cir. 2009); *Velez v. Thermo King de Puerto Rico, Inc.*, 585 F.3d 441, 447 n.2 (1st Cir. 2009); *Martino v. MCI Commc'ns Servs., Inc.*, 574 F.3d 447, 452 (7th Cir. 2009); *Bodkin v. Town of Strasburg*, No. 09-2167, 2010 WL 2640461, *2 (4th Cir. 2010) (unpublished).

Even if the Court is inclined to further elaborate upon the question presented, this case is an unsuitable candidate for resolving the issue. The record evidence shows that Respondent terminated Petitioner's employment for serious violations of workplace policy, including workplace dishonesty. Petitioner admitted under oath to the conduct for which his employment was terminated. Pet. App. 5a. Petitioner's arguments are not supported by his own sworn testimony or any other evidence in the record. Contrary to Petitioner's statement, the record is *not* "full of" undisputed facts demonstrating age bias. *Id.* at 5. The record is void of any such evidence. The Court's intervention is not required in this case.

D. The Decision Below is Correct

Respondent terminated Petitioner's employment due to acts of workplace dishonesty. Petitioner falsified at least seven leads in March of 2006 alone. Pet. App. 6a. Petitioner admitted under oath to inappropriately claiming at least one lead. *Id.* at 5a. He engaged in this misconduct even after previously receiving a Final Written Warning for the very same behavior. *Id.* at 4a.

At every turn the courts below rejected Petitioner's tenuous arguments of bias. There is no evidence that age was a factor in Respondent's decision to terminate Petitioner's employment, much less that age was the but-for factor. The appellate court correctly concluded that "under any standard" Petitioner's age discrimination claim would fail.

There are no issues of material fact which preclude summary judgment. The Sixth Circuit's decision affirming summary judgment for Respondent is correct and raises no issue worthy of this Court's review under Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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